RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

MONDAY 29 APRIL 2019

APPELLANT DEAN SWAIN

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

SEVERITY APPEAL

DECISION:

1. Appeal dismissed
2. Penalty of 18 months disqualification imposed
3. Appeal deposit forfeited

1. The appellant appeals against the decision of the stewards' panel of 28 February 2019 to impose upon him a period of disqualification of 18 months.

2. The allegation against him was a breach of Greyhound Racing Rule 83(2)(a), which was set out in detail in a charge sheet of 24 September 2018. But the charge will be summarised as:

> "That the appellant, as a registered trainer, while in charge of the greyhound Watch The Wasp, presented the greyhound for the purpose of competing in race 8 at Grafton on 11 July 2018 in circumstances where the greyhound was not free of a prohibited substance, namely, amphetamine, 4-hydroxyamphetamine and methamphetamine."

3. The appellant pleaded not guilty before the stewards' panel and in lodging his appeal to this Tribunal on 4 March maintained that denial of the breach of the rule. After service of the brief of evidence and and with the grounds of appeal on 19 March 2019, he admitted the breach of the rule. The appellant maintained this appeal on the basis of severity only. It is not necessary, therefore, to analyse the evidence in detail in relation to the breach.

4. The Tribunal will deal with the appellant and his personal circumstances before turning to the issues of objective seriousness.

5. The appellant is 49 years of age and has been married for 20 years, with three dependent children. Prior to entering this industry he was a metal roof plumber. The Tribunal pauses in its history to note that as a result of this disqualification he has re-established himself, against his better desires, to return to the industry as a metal roof plumber and has commenced working on his first contract for that purpose.

6. He describes himself as a professional full-time greyhound trainer. He operates his business in partnership with his wife and has done so for some six years. She is a licensed trainer as well. At the time of the detection of the breach he had 24 kennels and 24 greyhounds in training.

7. He first became a licensed owner in 1991, an owner/trainer in 1996, and a public trainer in 1999 – a history in the industry as a licensed person for 27 years. Both his parents were associated with the industry and effectively for the whole of his life, except when attending to his metal roof plumbing occupation, greyhounds have been his life.

8. He became a successful trainer, winning a Sydney premiership. He described to the stewards how he had had over 3000 winners, and that from a kennel with a maximum of 24 greyhounds indicates the success that he

enjoyed. It was his sole source of income. He acknowledges his prize money figures are not confidential and in the last complete financial year prior to his disqualification his prize money was some $360,000. He gave evidence that he generally operated on the basis of a share arrangement of 50-50 with the owners, he not being an owner of dogs, and whilst some of those owners paid him training fees or other expenses in addition, generally his income came from that share of the prize money. It will be apparent, therefore, that it provided some $180,000 a year to him, from which, of course, his costs of running the business had to be deducted.

9. Not surprisingly, he has given figures relating to his personal circumstances – and those will be kept confidential – touching upon rent and outgoings which so many in the community suffer. And, in addition, once his income was lost, he sold the various items he had – and again, the figures will not be given – which comprised a van and a trailer. He has been required to live on his limited savings and he says they are effectively exhausted, as are his assets at the present time.

10. Not surprisingly, as a regular winner, his greyhounds have been subjected to swabbing and he estimated in his evidence to the Tribunal that he was subject to some 150 swabs per year. It is, of course, as he said to the stewards, that he knew if his greyhounds were successful he would be swabbed, that being put on the issues, of course, relevant to objective seriousness and his subjective conduct.

11. A kennel inspection took place and at that kennel inspection he was told for the first time of the positive. The inspector quite fairly pointed out the shock and dismay with which the appellant received that news. He was so taken by it that, notwithstanding his capacity to have had his wife to continue to train the subject greyhounds, with appropriate regulatory approvals and with his removal from that entitlement, he elected not to do so and within four days of that kennel inspection and prior to his interim suspension, which took place about two weeks after that kennel inspection, he voluntarily divested himself, his kennels and his wife's entitlement, to the extent it might have arisen, from having any ongoing relationship with those dogs. They were transferred back to their owners.

12. He gave evidence today that he did so because of his concern to protect the owners and their reputations. He considers his actions to be unselfish and the acts took place out of loyalty to his owners and in his opinion was in their best interests. Actions which quite fairly the respondent acknowledges are matters that stand strongly in his favour.

13. He says in his evidence that he wishes to return to training on a full-time basis. He acknowledges that he has been divested of his business asset to date and it will take time for him to re-establish himself, to obtain new owners and therefore greyhounds and to build his kennel up and that there

will be time involved in that. Understandably, and quite fairly – and he quite passionately pointed out – he is returning to his former trade of metal roof plumber not by desire but by necessity, particularly having regard to the hard physical nature of that work and the physical impact that his previous efforts in that industry had occasioned to him.
14. He, as is the case with virtually all with whom this Tribunal deals in all three codes, had this life with greyhounds as essentially his social life. He described how nearly all his friends were associated with the industry and that he was now ostracised from it, circumstances which the Tribunal fully understands. He gave evidence of the impact upon him in relation to his reputation, which previously had been at the highest level, and the impact upon him personally and that on his family of adverse social media commentary.

15. He described to the stewards how his mental health had suffered as a result of this breach.

16. It is also to be noted that during the kennel inspection he was observed, whilst the inspector's back was turned but observing him by reflection in a monitoring screen, to remove from a tin items which were described as chewables, otherwise contents not known to the Tribunal, and, on a second occasion, again while the inspector's back was turned, to remove from that same tin what turned out to be MDMA.

17. The police were called. He was prosecuted. He pleaded guilty to and was sentenced for possession of that MDMA and subject to a fine of $800. That is a matter of public record. It is referred to as relevant in these proceedings because he described to the stewards, and repeated in brief terms to the Tribunal, the salutary effect that the words of the sentencing magistrate had upon him as to the foolhardiness of his actions and to the possible consequences of a greater nature that might have befallen him. That is relevant when the Tribunal turns to look at, on an issue of objective seriousness, the subjective message that must be given to this appellant.

18. It is quite apparent from his immediate dismay at being found to have a positive presentation to his actions in divesting himself of these greyhounds before he was suspended, of his evidence about the effect upon him personally and his evidence about the effect upon him financially, that the prospects of him breaching the rules again, should he be allowed to return to the industry, are much diminished.

19. He said he would ensure he did not offend again. The Tribunal put to him if he did not know how the substances came to be present in his greyhounds, how he could take any actions to prevent it occurring again. His answer was an increased security, an increased vigilance, a reduction in that open trust that is so often necessary in an industry such as this as to

the actions of others. And here he described the actions, for example, of handlers.

20. It is necessary to digress to the objective seriousness to put those remarks in further context. It is that he did not admit the breach of the rule to the stewards because of his belief that he expressed to them, albeit frankly, that it was a contamination case, not occasioned by him or, importantly, by any failures of a husbandry or other nature on his behalf.

21. As the stewards found, there was no evidence to support such a scenario. As the stewards found, and as the Tribunal has so often reflected, such a belief could get no higher than speculation. He did try to obtain, but it was not available, CCTV footage of the kennels to attempt to find a possible source of contamination. That was not available. At the end of the day, he was not able to adduce any evidence on contamination. It may well remain in his own mind – and understandably so – the cause of his downfall, but it cannot be further taken into account.

22. In relation to subjective circumstances, it is necessary to have regard to his admission of the breach to the Tribunal. As has been set out, he did not admit the breach to the stewards. This Tribunal has said that those who make an admission of the breach and their wrong conduct from the outset and cooperate with the stewards and, if it is an appeal matter, maintain that admission and cooperation at the appeal tribunal hearing, they are entitled to a 25 percent discount. This appellant does not submit he is entitled to that, and nor is he. It is a question of what utilitarian value there is and whether by now admitting the matter – and he is now represented – he is entitled to some other reduction.

23. This admission was made soon after the brief was served, within a matter of two weeks of the notice of appeal, before the respondent was otherwise required to prepare – or again prepare, as it had to be done with the stewards' inquiry – a defended case, that there is that utilitarian value to the respondent and, of course, to the Tribunal that the admission was made.

24. Having regard to the determination of the stewards, it is quite apparent that they did not treat the denial of the breach of the rule before them as a matter of great substance. It would be fair to say that their determination was not delayed or made more difficult in any substantial way by the non-admission. As the submissions today quite fairly point out – and again a matter of great fairness displayed by the respondent to this appellant – is that in essence he was not really challenging the matter, and accepting that there was a presentation and accepting there were prohibited substances, but he was, quite understandably – it is normal human nature – struggling to try and find an explanation for the breach.

25. There must be consistency, however, in respect of these matters and the Tribunal has quite consistently in recent times said that those circumstances would warrant a 15 percent discount. To the extent to which mathematical formulae are adopted, the Tribunal determines that 15 percent is an appropriate consideration of the discount for the fact this is a severity appeal in the Tribunal only.

26. What then of the objective seriousness of the appellant's conduct?

27. Firstly, the drugs are permanently banned prohibited substances. That is, of course, reflected in the fact they are category 2. But they are permanently banned. There is no place for them in the greyhound at all. It raises issues not just of integrity but of welfare. And that is welfare of the greyhound. It is, therefore, that the penalty guidelines have been written to reflect both those integrity and welfare issue on drugs are of such seriousness.

28. At the end of the day there can be no explanation of how, when, why or by what route these drugs came to be present in this dog at its presentation. As has been said, there is no evidence of contamination and it is not necessary on objective seriousness to examine that evidence any further.

29. The Tribunal has said since 27 February 2018, post the decision of Kavanagh v Racing Victoria Limited [2018] VCAT 291, a decision of Justice Garde, adopting what was said in McDonough, that this therefore becomes what was assessed in McDonough and adopted in Kavanagh and adopted by the Tribunal since, a level 2 seriousness. It is not level 1 where the culpability of the trainer is established. It is not level 3 where exculpation by the acceptance of an explanation blaming others is available. It is that it is not able to be determined. What that means, therefore, is that an appropriate penalty must be formulated to reflect that it is a level 2 matter.

30. As the Tribunal has already said, the message to be found is much reduced on subjective findings, and that is taken into account. On the objective message, notwithstanding the recent decision of Justice Fagan in Kavanagh v Racing NSW, [2019] NSWSC 40, there is no exculpation finding, or category level 3 finding, that was adopted in Kavanagh v Racing Victoria by Justice Garde where it is not proper to use an objective message where there is no culpable conduct. Here it is level 2 and the Tribunal is of the opinion that it must formulate a decision which adopts objective seriousness, the message to the industry at large and other trainers and the like that a presentation with a permanently banned prohibited substance requires that an appropriate penalty be framed. The Tribunal does not have to, as it were, pluck from the air an appropriate consideration of starting point because the regulator has done so through the GRNSW Penalty Table, now adopted by GWIC, which provides that these drugs are category 2.

31. It must be noted that in fairness to this appellant the respondent acknowledges that the evidence before the panel was that each of the three substances detected may well have come from just one of them, which is the methylamphetamine. There are various other ways that each of the three might have been present. But that reduces, to some extent, the seriousness because it might have been only one substance, not two, that caused the three detected substances to be present. But that is speculative because it is not known how, when, why or by what route. Likewise, the fact that it was a low level detection is a matter, on objective seriousness, in favour of the appellant. However, that low level might have been detected after a very large dose some considerable time before or a very small dose proximate. The fact it was a low level is relevant to a comparison to other matters – and that level, for the record, is between five and seven for one of the drugs.

32. The regulator has decided that for a category 2 drug, on a first presentation, a starting point of three years' or 156 weeks' disqualification is appropriate. The stewards' panel adopted that. The Tribunal has said that for parity and certainty purposes to all involved in the industry it should have regard on a guideline, not tramline, basis that is where the industry regulator considers this breach should start for consideration of penalty. The Tribunal adopts it.

33. Interestingly, the guidelines as such are written on the basis that there is an increase for prior matters rather than written on the basis that there is a loss of reduction for prior matters.

34. The effect of the two priors, to which the Tribunal again will return, would be to add 12 months for the more recent one in 2016 and 6 months for the earlier one in 2014, which would give a starting point of 174 weeks. The Tribunal has previously expressed an element of discomfort that it is treated as an aggravation rather than a loss and will return to the issue of whether or not it should look at a starting point of 156 or 174 weeks.

35. What then of those prior matters? Regardless of how they are looked at and what they were for, they do mean, as the Tribunal has consistently said, that regardless of their age and regardless of the different nature of those presentations when the five categories of the penalty guidelines are considered, this appellant cannot expect to be dealt with in the same way as any other person who has had a lengthy period of training and has had no priors. To do so would lead to a disproportionate outcome for this appellant compared to the others.

36. The first one was in 2014 and it was for an anti-inflammatory meloxicam, and the same anti-inflammatory was for his 2016 presentation, dealt with in April 2017. He explained to the stewards that he got the

administration periods wrong. In the former matter he was fined $750; in the latter, $2000. The stewards had before them the 2017 matter. There the appellant had pleaded guilty and they took into account that there was a 2014 prior matter and his changes in his practices after that – unfortunately, they do not appear to have been absolute changes because of this matter – and his good character and significant personal financial circumstances.

37. Those matters, under the current guidelines, would be considered category 2. It is fair to say that in determining whether there should be any loss of reduction or increased starting point, the fact that they were category 2 matters makes them less serious on a loss of reduction or addition than categories 5, 4 or 3. On the other hand, they are more serious, obviously, than category 1. They are relatively proximate. While one was five years ago, the other was three years ago. They are not distant matters. They involved presentations; they involved prohibited substances. This is a presentation and this is a prohibited substance matter.

38. Aspects of a level playing field not only deal with the fact that it requires that all greyhounds race unencumbered by substances that are not allowed, but that it leads to what might be described as a balanced approach to each individual matter. That introduces the issue of parity. As the Tribunal and as every jurisdiction ever required to deal with aspects of parity always struggles to find similarity with the same facts and circumstances as the person being dealt with. This is no different. This appellant's matter is to be determined on the facts and circumstances of his case. If there happened to be a precise other case in the past, then this appellant would expect, as would that other appellant, that similar outcomes would be imposed.

39. The principal one referred to here is the decision of the Tribunal of Lord, 19 May 2017, presentation, severity appeal. The difficulty with Lord is that there are many facts that make this conduct here less serious and others which make this conduct less capable of similar reductions. Lord received a nine-month disqualification after a 25 percent for subjectives and a 25 percent for assistance to the authorities. That latter 25 percent is not raised as a factor here. That was a substantial variation to a 25 percent discount for top-level subjective circumstances, which this Tribunal has considered appropriate for a considerable period of time.

40. Just briefly on Lord: he was a trainer of some 200 greyhounds, compared to 24 here. He had a prior 11-odd years earlier, for which he received a two-year disqualification. It was able to be established that an attendant was the user of the subject amphetamine which led to the prohibited substance detection, but that Lord himself had some less than satisfactory husbandry or kennel operation procedures which did not remove him entirely from blame.

41. The other matter mainly referred to today was Howson, who had pleaded not guilty, had no prior matters and a trainer of 32 years, received an 18-month disqualification.

42. It is apparent, therefore, that when looking at Lord there was a substantial additional discount that was given for assistance to authorities of 25 percent. It provides a substantial reason, in addition to many other factors, for such a low penalty against Lord.

43. Many other cases have been referred to in the decisions that have been handed up, referred to in the stewards decision and in the submissions made to the Tribunal today. The range of penalties varies, not surprisingly, with the range of different facts. The key ones are whether there were priors or not, whether there was an admission of the breach or not and longevity in the industry. The factors are so variable that an analysis in more detail in this case of those other matters is not required.

44. At the close of submissions, it was submitted, whilst acknowledging a disqualification was an inevitable outcome, that this appellant might be visited with some reduction at the end of any period of disqualification by the imposition of a monetary penalty or by the suspension of part of the period of disqualification.

45. The Tribunal has expressed in the distant past, but not in recent times, that a fine of $500, calculated on a monthly basis, might equate to a one-month period of disqualification. Interestingly, on this appellant's past success as a trainer, that would work out at some $15,000 worth of income that he would gain by outlaying $500. It is, of course, to be acknowledged that he will, however, have divested himself of that income if and when he returns to the industry and it will be some period of time – if not a lengthy period of time – before he got anywhere near $15,000 a month in his share of prize money again. Therefore, on any short term, $500 a month could equate to any likely early starting point.

46. The other submission was that some of the disqualification should be suspended on the basis he be of good behaviour. The rules permit that in this jurisdiction. The Tribunal has given consideration to those matters.

47. The Tribunal is of the opinion that a disqualification is appropriate. The Tribunal forms an opinion that the imposition of a reduction of that period of disqualification would not fairly reflect the severity of a permanently banned prohibited substance presentation by a trainer with two prior matters. The benefit to this appellant of any discount will be reflected in the total discount given to him, which will embrace all of the subjective circumstances. The Tribunal is not of the opinion that an appropriate message would be given to the industry at large that he should, by some further reduction in an

appropriate period of disqualification, be able to reduce it by $500 a month, or some greater amount, or, alternatively, to have some of it suspended.

48. The stewards very generously reduced their starting point by a substantial amount and effectively took into account all of the matters which this Tribunal has heard about today in determining a discount. The Tribunal is of the opinion that a 25 percent discount is appropriate for the nature of the subjective circumstances that are here. However, in fairness, there are some additional matters which warrant an increase in that 25 percent to 40 percent. In particular, his actions in immediately divesting himself of his greyhounds, the not insubstantial financial impact it has had upon him and, in addition, the substantive subjective lesson that has been learnt, for all the reasons previously summarised. Without repeating all of those matters, which are taken into account on his behalf, the Tribunal has determined that he will receive a 40 percent discount.

49. In fairness to the stewards, as has been said, they also took into account in determining that figure the fact that it was not really a full-blown defended matter before them. As the Tribunal has said earlier, it has determined that in addition to that there will be a 15 percent discount to which reference has been made. The calculation, to the extent it might be said to be a calculation of such a nature, means that the Tribunal, in giving a 40 percent discount to a starting point of 156 weeks comes down to 94 weeks. When 15 percent is taken off that, it comes down to 80 weeks. 80 weeks very generally corresponds to the 78 weeks that the stewards found to be appropriate.

50. If the calculation is based on a starting point of 174 weeks, those discounts would bring it to 99 weeks. 80 weeks and 99 weeks is more than the stewards' panel found to be appropriate.

51. The Tribunal is not asked to extend the 78 weeks, or 18 months, which the stewards' panel found to be appropriate.

52. The Tribunal does not find any reason to give greater discounts or other reductions which might reduce that 18-month period, which the stewards found to be appropriate, because its consideration of the matter would lead to a slightly greater penalty – on one case, a greater penalty – if the higher starting point was to be adopted. No such outcome was flagged to this appellant either before or during this hearing, and nor is it an appropriate outcome.

53. The Tribunal is of the opinion that the appellant be disqualified for a period of 18 months. The same calculations and orders which the stewards' panel found to be appropriate and the starting point are applied, which means in effect that the period of disqualification will expire on 13 March 2020.

54. The order, therefore, is that the severity appeal is dismissed.

55. A period of disqualification of 18 months, to expire on 13 March 2020, is imposed.

56. There being no application for a refund, the Tribunal orders the appeal deposit forfeited.
